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Nos. PD-1236-20 through PD-1240-20

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED COURT OF CRIMINAL APPEALS 1/28/2021 DEANA WILLIAMSON, CLERK

BRIAN RAY MIDDLETON,

Appellant

V.

STATE OF TEXAS,

Appellee

Appeal from Liberty County
Trial Causes CR31225 through CR31227 & CR34574 & CR34752
Appeal Nos. 09-20-00014-CR through 09-20-00018-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

- * The parties to the trial court's judgment are the State of Texas and Appellant Brian Ray Middleton.
- * The trial judge was Hon. Chap B. Cain, III, Presiding Judge, 253rd District Court, Liberty County, Texas.
- * Appellant was represented in the trial court by Elizabeth Coker, P.O. Box 300, Livingston, Texas 77351.
- * Appellant was represented in the Court of Appeals by Tom Abbate, 2323 South Voss Street, Suite 360, Houston, Texas 77057.
- * The State was represented at the 2015 guilty pleas for the first three cases by Joe Warren and Ragis Fontenot and at the 2020 sentencing proceeding on all five cases by Kayla Herrington, each of the Liberty County District Attorney's Office, 1923 Sam Houston Street, Liberty, Texas 77575.
- * Counsel for the State in the Court of Appeals by Assistant District Attorney Stephen Taylor, Liberty County 1923 Sam Houston Street, Liberty, Texas 77575.
- * Counsel for the State before this Court is Emily Johnson-Liu, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Concurrent sentences are the defendant's reward for same-criminal-episode offenses "prosecuted in a single criminal action." Are defendants on deferred who commit the same offense again also rewarded if the trial court hears both the new and deferred cases together? The court of appeals held that they are, proving just how far the caselaw has strayed from the legislative requirement that such offenses be "prosecuted in a single criminal action."

STATEMENT REGARDING ORAL ARGUMENT

The State requests argument to aid the Court as it works with its primarily 1990s body of caselaw and considers how Section 3.03(a) might apply to a variety of different scenarios: proceedings that suspend multiple sentences; revocation hearings (deferred or straight probation); and cases like this one with mixed stages of prosecutions.

STATEMENT OF THE CASE

Appellant was placed on ten years' deferred adjudication in three theft cases.¹ While still on deferred, he was charged with two new thefts, and the State petitioned to adjudicate.² He pleaded true to the probation-violation allegations and guilty to the two new charging instruments.³ At a combined sentencing hearing, all five theft victims testified, ⁴ and the trial court found Appellant violated his deferred

¹ 2 Supp. RR 6 (guilty plea on all three cases), 9 (placed on deferred in latter two cases); 3 Supp. RR 4 (placed on deferred on first case). Consistent the court reporter's designation, the State will refer to the 2015 plea proceedings as "Supp. RR," proceeded by the volume number, and to the Jan. 9, 2020 sentencing hearing as "RR." The clerk's records will be referred to by the numerical part of the trial cause number (*e.g.*, 31225-CR at ___).

² 31225-CR at 29; 31226-CR at 18; 31227-CR at 22; 34574-CR at 2; 34752-CR at 3.

³ The parties reference a hearing where Appellant entered open pleas of true and guilty in the pending cases, but it appears not to have been transcribed. RR 6 (summarizing the earlier hearing, "There's three trues and there's two guilties"), 8 (State asking trial court to take judicial notice of pleas of true on first three cause numbers and guilty on last two).

⁴ RR 10, 23, 28, 33, 39.

adjudication probation and was guilty of the new offenses.⁵ In each case, it assessed a two-year state-jail sentence, to be served consecutively.⁶ On appeal, Appellant argued that Tex. Penal Code § 3.03(a) prohibited stacking because the offenses were part of the same "criminal episode" prosecuted in a "single criminal action." The court of appeals agreed that, as repeated theft offenses, the cases necessarily arose out of the same "criminal episode" as that term is defined in Penal Code § 3.01(2). It also held that, because the revocation and guilty-plea proceedings were heard together rather than serially, they were "prosecuted in a single criminal action." Consequently, it deleted the cumulation orders.⁹

STATEMENT OF PROCEDURAL HISTORY

The court of appeals issued its opinion November 25, 2020. No motion for rehearing was filed. This Court granted the State an extension of time to file this petition by January 28, 2021.

⁵ RR 73.

⁶ RR 73.

⁷ App. COA Brief at 8-10.

⁸ *Middleton v. State*, Nos. 09-20-00014-CR through 09-20-00018-CR, 2020 WL 6929642 (Tex. App.—Beaumont Nov. 25, 2020) (not designated for publication).

⁹ *Id*.

GROUND FOR REVIEW

If a case at the petition-to-adjudicate stage and a defendant's subsequent similar crime at the guilt phase are heard simultaneously, are they "prosecuted in a single criminal action" such that any imposed sentences must run concurrently?

ARGUMENT

The controlling statute.

The statute at issue, Section 3.03(a), appears in Penal Code Chapter 3, which is entitled "Multiple Prosecutions." Section 3.02 permits the repeated commission of similar offenses ¹⁰ to be consolidated for trial. Section 3.03(a) provides that consolidated cases will result in concurrent sentences:

When the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced. [Except for certain offenses like intoxication manslaughter and sex offenses named in Subsection (b)], the sentences shall run concurrently.¹¹

Section 3.04(a) gives the defense the right to sever (except for offenses in § 3.03(b)) but, if exercised, the sentences can either be concurrent or consecutive.

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¹⁰ "[C]riminal episode' means the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances…(2) the offenses are the repeated commission of the same or similar offenses." TEX. PENAL CODE § 3.01(2).

¹¹ TEX. PENAL CODE § 3.03(a).

What is not at issue.

The State does not contest that Appellant's two new theft indictments were consolidated. The trial court heard Appellant's guilty pleas, recessed both cases for preparation of a presentence report, and, in a combined sentencing hearing, found Appellant guilty of both offenses and imposed sentences.¹² Consequently, these sentences should be served concurrently.

Similarly, Appellant's three original deferred adjudications were likely also consolidated as to each other. Nearly everything about the cases was done concurrently. They were indicted the same day. Appellant pled guilty in a jointly conducted hearing. Although Cause CR31225 was continued to determine restitution and his deferred-adjudication disposition occurred in a separate proceeding from the other two cases, thereafter, the cases were conducted together. The State moved to revoke all three cases the same day, and following his open pleas of true, he was implicitly found guilty and sentenced in all three cases in another jointly conducted hearing. To the extent Section 3.03(a) applies to cases

¹² RR at 73; 34574-CR at 11, 14, 30; 34752-CR at 9, 25.

¹³ 31226-CR at 2; 31227-CR at 2.

¹⁴ 2 Supp. RR 6.

¹⁵ 2 Supp. RR 9-10; 3 Supp. RR 4.

¹⁶ RR 73-74.

initially deferred and then adjudicated guilty in a single proceeding, ¹⁷ the sentences on all three of these original theft offenses must be served concurrently.

The issue is whether the new and old can be stacked on each other.

Concurrent sentences result from concurrent prosecutions.

The court of appeals erred to conclude that because Appellant's deferred theft cases and new theft offenses were heard together at one point that they were "prosecuted in a single criminal action." A joint proceeding is certainly necessary, but it is not a sufficient condition for cases to be "prosecuted in a single criminal action." To hold otherwise rewrites "action," which generally means "lawsuit," as "hearing or proceeding."

Within its chapter 3 context, "prosecuted in a single criminal action," means the cases were consolidated. Under the process required in Section 3.02, which requires notice of consolidation, this envisions something deliberate. It is not clear

¹⁷ Nguyen v. State, 359 S.W.3d 636, 646 (Tex. Crim. App. 2012), which required sentences in non-sex offenses imposed during a hearing on a motion to adjudicate to be served concurrently, implicitly suggests it does.

¹⁸ "Action," BLACK'S LAW DICTIONARY 28 (6th ed. 1990) ("Term in its usual legal sense means a lawsuit brought in a court....Criminal actions are such as are instituted by the sovereign power (*i.e.* government), for the purpose of punishing or preventing offenses against the public.") (also including definitions for "civil action" and "class action"). It is used in this sense throughout the Code of Criminal Procedure. *See, e.g.*, TEX. CODE CRIM. PROC. art. 27.01 ("The primary pleading in a criminal action on the part of the State is the indictment or information."); *Id.* Ch. 38 ("Evidence in Criminal Actions").

that anyone thought Appellant's two different sets of cases had been consolidated. No one asked for it, and the trial court thought its ability to stack was limited only by Article 42.08.¹⁹

Also, consolidation in the typical sense, and as it is used in Chapter 3, means consolidation for trial.²⁰ Section 3.02 requires the State to give 30-days' notice of consolidation before trial.²¹ It was impossible to consolidate Appellant's old and new cases since at the time the old cases were disposed of by deferred adjudication, Appellant had not even committed the new offenses.²² Whatever the precise

¹⁹ RR at 73. None of the clerk's records in the instant case contain a consolidation notice.

²⁰ See Tex. Code Crim. Proc. art. 37.07, § 1(c) (requiring multiple verdicts if two or more offenses are consolidated for trial under Penal Code Chapter 3); *Id.* art. 27.05 (providing a special plea if there was a prior prosecution for a different offense arising out of the same criminal episode that "was or should have been consolidated into one trial..."). Indeed Section 3.03(a) is frequently described in terms of cases heard together for trial. See, e.g., Sullivan v. State, 387 S.W.3d 649, 651 (Tex. Crim. App. 2013) ("When offenses [arising from the same criminal episode] are tried together pursuant to chapter three, the sentences must be concurrent unless a specific exception within chapter three provides otherwise.").

²¹ TEX. PENAL CODE § 3.02(b). *See Murray v. State*, 302 S.W.3d 874, 880 (Tex. Crim. App. 2009) (determining that guilty plea proceeding was a "trial" for purposes of statute giving district court jurisdiction over misdemeanor offenses included in the indictment "[u]pon trial of a felony case.").

²² Although, as described later, this Court in *LaPorte v. State*, 840 S.W.2d 412, 414 (Tex. Crim. App. 1992), *overruled on other grounds by Ex parte Carter*, 521 S.W.3d 344, 347 (Tex. Crim. App. 2017), eliminated a requirement of consolidation notice before Section 3.03(a) applied, it did not eliminate a requirement that the cases be *capable* of consolidation.

deadlines for consolidation,²³ years after trial is too late to consolidate cases into a single prosecution.²⁴

Even if a revocation is a new kind of "trial" and two motions-to-adjudicate could be consolidated for the first time at that stage, Appellant's two sets of cases weren't at the same phase of prosecution. "Single criminal action" has to mean the same *kind* of action, and these just weren't. They lacked a shared purpose since the issue at a revocation is not about guilt of the offense.²⁵ The burden of proof was

²³ Robbins v. State, 914 S.W.2d 582, 584 (Tex. Crim. App. 1996), which considered cases to be consolidated for the first time *during* a plea proceeding, suggests that the time for consolidation may run at least into the beginning of the trial proceeding itself.

²⁴ See Thornton v. State, 986 S.W.2d 615, 617-18 (Tex. Crim. App. 1999) (defendant's motion to sever must be made prior to guilt phase of trial).

²⁵ See TEX. CODE CRIM. PROC. art. 42A.108(b) ("The defendant is entitled to a hearing limited to a determination by the court of whether the court will proceed with an adjudication of guilt on the original charge."); Ex parte Sledge, 391 S.W.3d 104, 111 (Tex. Crim. App. 2013) ("Any subsequent proceeding for purposes of deciding whether to proceed to adjudication does not involve a revisitation of the initial guilt-substantiation determination."). With a deferred adjudication, "further proceedings" are "defer[red]." TEX. CODE CRIM. PROC. art. 42A.101(a). This Court has characterized this process as "temporarily still[ing]" "the movement of the course of developments in a criminal action." McIntyre v. State, 587 S.W.2d 413, 417 (Tex. Crim. App. 1979). Should the deferred adjudication probationer fail to abide by the terms of his probation, "the movement in a criminal action continues with the normal incidents of trial." See also Taylor v. State, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004) ("If he fails [at his deferred adjudication probation], the case continues on as if it had never been interrupted."); Cobb v. State, 851 S.W.2d 871, 874 (Tex. Crim. App. 1993) (revocation is an "extension" of trial court's sentencing power and thus probation conditions need not be proven). While descriptive of the process in general, this characterization does not make the motion-to-adjudicate hearing a mere continuation of the original guilty plea proceeding. A deferred adjudication is a disposition of the case, one that can include the possibility of

different.²⁶ And the factfinder could be different because, unlike with a revocation,²⁷ a defendant in a new criminal case has a right to a jury. After the proceeding was over, Appellant's appellate rights would be different as to each set of cases.²⁸

The hearings overlapped at the end, yes, but this was not, essentially, a single lawsuit start to finish.

How the court of appeals may have lost sight of the single prosecution idea.

This Court has not considered whether hearing both a case on deferred and a new offense is the prosecution of a single criminal action. But the evolution of this Court's § 3.03 jurisprudence somewhat explains why the court of appeals concluded that it was.

Not long after the passage of Section 3.03, this Court held that a court conducting joint proceedings on same-criminal-episode offenses could still stack the

appeal. *Kirk v. State*, 942 S.W.2d 624, 625 (Tex. Crim. App. 1997). Other notable events will have occurred in the interval, not the least of which is a violation of the defendant's probation. Moreover, it is only "[a]fter an adjudication of guilt" that "all proceedings...continue as if the adjudication of guilt had not been deferred." TEX. CODE CRIM. PROC. art. 42A.110(a). Even this does not imply that the trial court must treat the grant and violation of probation as never having occurred.

²⁶ Hacker v. State, 389 S.W.3d 860, 864–65 (Tex. Crim. App. 2013).

²⁷ *Hood v. State*, 458 S.W.2d 662, 662 (Tex. Crim. App. 1970).

²⁸ See Wright v. State, 506 S.W.3d 478, 481 (Tex. Crim. App. 2016) (attack on original conviction in an appeal from revocation proceedings is generally not allowed).

without a consolidation notice, the Court reasoned, the causes did not constitute one criminal action. The Court reversed course in *LaPorte v. State*. LaPorte held that the State's noncompliance with the notice requirements did not transform LaPorte's contested jury trial on two drug indictments into "a non-Chapter 3 joinder trial." A defendant could waive consolidation notice and, as long as the proceeding was a single criminal action involving consolidation of 'same criminal episode' offenses, concurrent sentences were required. *LaPorte* explained: "a defendant is prosecuted in 'a single criminal action' whenever allegations and evidence of more than one offense arising out of the same criminal episode . . . are presented in a single trial or plea proceeding." The Texas Legislature intended a 'single criminal action' to refer to a single trial or plea proceeding."

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²⁹ Caughorn v. State, 549 S.W.2d 196, 197 (Tex. Crim. App. 1977), overruled by LaPorte v. State, 840 S.W.2d at 414.

³⁰ *Id*.

³¹ 840 S.W.2d at 415.

³² *Id.* at 414.

³³ *Id.* at 414-15; *Ex parte Carter*, 521 S.W.3d at 347 (plurality reaffirming this holding).

³⁴ Ex parte Pharr, 897 S.W.2d 795, 796 (Tex. Crim. App. 1995); LaPorte, 840 S.W.2d at 414.

In *Ex parte Pharr*, this Court held that serially-conducted hearings (calling and completing each case before calling the next) does not constitute a single trial or plea proceeding and, thus, the sentences can be stacked.³⁵ In *Duran v. State*, the Court considered two guilty pleas and their subsequent revocations and held that the record did not show that a single criminal action occurred.³⁶ The *per curiam* opinion did not explain why. In concurrence, Judge Baird indicated the motions to revoke were conducted jointly but the guilty plea proceedings may not have been; Duran had waived a court reporter and the record was otherwise silent on the matter.³⁷ Judge Baird also explained that "to be entitled to concurrent sentences under § 3.03 appellant must establish that the offenses were consolidated at the time of his pleas as well as the hearings on the motions to revoke his probation."³⁸

In 1996, *Robbins v. State* clarified that not every separation would defeat the "single criminal action" designation. In a *per curiam* opinion from which Judge Baird dissented for the reasons he gave in *Duran*, the *Robbins* court held that hearing a defendant's guilty pleas separately and then completing sentencing together *does* constitute a single proceeding because "[a] plea proceeding is not complete until

³⁵ 897 S.W.2d at 796.

³⁶ *Duran v. State*, 844 S.W.2d 745, 746 (Tex. Crim. App. 1992).

³⁷ *Id.* at 748 (Baird, J., concurring).

 $^{^{38}}$ *Id*.

punishment has been assessed" and thus one case was not fully completed before the next one started.³⁹

The court of appeals erred to conclude Robbins controlled.

The court of appeals erred when it relied on *Robbins* to hold that separate plea hearings in the instant case rendered the cases prosecuted as if they were one.⁴⁰ Robbins pled guilty to two indictments at separate hearings and, before there was a disposition in either case, he received prison sentences in a consolidated punishment hearing.⁴¹ Although the cases had technically begun separately, this had no legal significance. Because Robbins's guilty pleas made the plea and punishment phases a unitary proceeding,⁴² combining the cases for "punishment" essentially meant that the entire process had been held jointly.

The same could not be said of the plea hearings here, which were held years apart and after the first set of cases had been disposed of by an appealable order. If any case is analogous to what happened here, it is *Duran*, not *Robbins*.

³⁹ 914 S.W.2d at 584.

⁴⁰ *Middleton*, 2020 WL 6929642, at *3.

⁴¹ Robbins, 914 S.W.2d at 583.

⁴² See State v. Davis, 349 S.W.3d 535, 540 (Tex. Crim. App. 2011) (guilty plea transforms proceeding into "unitary trial' to determine the remaining issue of punishment"); see also Barfield v. State, 63 S.W.3d 446, 449 (Tex. Crim. App. 2001) (bifurcation applicable only to pleas of not guilty before a jury).

Other courts intuitively rejected that these hybrid proceedings could be a single prosecution.

Other courts of appeals, both before and after *Robbins*, have rejected the idea that joint proceedings on a revocation and new offense could be considered a consolidated prosecution. In *Crider v. State*, the court of appeals held that such proceedings did not meet *LaPorte*'s definition of "single criminal action" because the straight-probation revocation did not involve allegations or evidence of commission of an offense. **A Rivas v. State*, quickly and without explanation, came to the same result concerning a motion to adjudicate (*i.e.*, deferred adjudication revocation) held during the jury's penalty-phase deliberations on a new, but similar, offense. **44

⁴³ 848 S.W.2d 308, 309, 312 (Tex. App.—Fort Worth 1993, pet. ref'd) (judge deciding whether to revoke *straight* probation and jury deciding guilt of new offense). *Crider* also called the revocation "administrative." *Id.* This Court has since criticized the use of "administrative proceedings" to describe revocations since they are not conducted by an administrative agency but by courts using many of the procedures applicable to criminal trials. *Ex parte Doan*, 369 S.W.3d 205, 208-10 (Tex. Crim. App. 2012). Nevertheless, the differences in aim and panoply of rights underscore that the cases are not truly a single, unitary prosecution.

⁴⁴ Nos. 14-98-01442-CR through 14-98-01444-CR, 2001 WL 459947 (Tex. App.—Houston [14th Dist.] May 3, 2001, pet. ref'd) (not designated for publication). Although the court said earlier convictions did not arise out of the "same criminal episode" as the most recent, it is clear from its citation to *Crider* and *LaPorte* that it meant "same criminal action."

Dach v. State, which was decided after but did not cite Robbins, relied on Judge Baird's concurrence in Duran that the offense had to be consolidated at the time of the guilty-plea proceedings in concluding that a new offense was not "prosecuted in a single criminal action" with the probated case. And in In re Sanna, the same court of appeals as in the instant case decided, albeit in a mandamus case, that a defendant did not "demonstrate that evidence of more than one offense was presented in a single proceeding" when a motion to adjudicate was heard with the trial on punishment for a new offense.

The instincts of these courts are right, but the rule still needs to be articulated. Given that *Robbins*'s status as an exception is not set out in the *per curium* decision and the court of appeals below extended it one step too far, input from this Court is needed before more courts travel the errant path away from the statute.

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⁴⁵ 49 S.W.3d 490, 491 (Tex. App.—Austin 2001, no pet.) (involving *straight* probation). As in *Crider*, it is not immediately apparent why the terms of 3.03(a) would even apply to a revocation of straight probation since that is not a proceeding where the defendant is "found guilty of more than one offense." Tex. Code Crim. Proc. art. 3.03(a). If only *deferred-adjudication*-revocation-and-new-offense combo-trials trigger 3.03(a) concurrent sentencing, this begs the question why the legislature would reward the failed *deferred* probationer with a new sentence that merges into his original offense and not the straight probationer. The deferred probationer may receive greater benefits at the outset, but that favorable status flips on adjudication since he must face the entire punishment range.

⁴⁶ *In re Sanna*, No. 09-12-00018-CR, 2012 WL 252562 (Tex. App.—Beaumont Jan. 25, 2012) (not designated for publication).

Why this issue is important even if it can be sidestepped in many cases.

Even if a prosecutor could avoid the result in this case by scheduling separate proceedings, that practical possibility is an inadequate fix. ⁴⁷ Because of the "repeated commissions of the same or similar offenses" definition of "criminal episode," new cases could easily arise years into a defendant's probation and not trigger the prosecutor's same-criminal-episode alarm for concurrent sentences. ⁴⁸ And the issue is bigger than just Article 3.03. The existence of two related statutes—the multiple-prosecutions statute for controlled substances and a court-cost statute—could potentially amplify the results of the court of appeals's interpretation. ⁴⁹

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⁴⁷ Ex parte McJunkins, 954 S.W.2d 39, 40 (Tex. Crim. App. 1997) ("The State has the choice to lay the predicate for mandatory concurrent sentencing by choosing whether to join (or consolidate) them in a single criminal action.").

⁴⁸ TEX. PENAL CODE § 3.01(1) (first definition of "criminal episode"). The courts of appeals have held that § 3.01(2) doesn't impose a particular time frame that the same or similar offenses must have been repeated. *See Waddell v. State*, 456 S.W.3d 366, 369 (Tex. App.—Corpus Christi–Edinburg 2015, no pet.); *Baker v. State*, 107 S.W.3d 671, 673 (Tex. App.—San Antonio 2003, no pet.); *Guidry v. State*, 909 S.W.2d 584, 585 (Tex. App.—Corpus Christi–Edinburg 1995, pet. ref'd).

⁴⁹ TEX. HEALTH & SAFETY CODE § 481.132(d); TEX. CODE CRIM. PROC. art. 102.073(a) (court may assess each court cost or fee only once against the defendant "[i]n a single criminal action") (no express same-criminal-episode requirement). *See Hurlburt v. State*, 506 S.W.3d 199, 202 (Tex. App.—Waco 2016, no pet.) (looking to *LaPorte* and this Court's other Penal Code § 3.03 cases in interpreting art. 102.073(a)). Courts of appeals typically equate "single criminal action" with a single proceeding. *See, e.g., Guerin v. State*, No. 02-18-00509-CR, 2019 WL 4010361, at *1 (Tex. App.—Fort Worth Aug. 26, 2019, no pet.) (not designated for publication) (striking court costs for multiple convictions tried in a single proceeding).

Also, there is the even-greater potential for a trial court to be blindsided. Article 3.03(a) may be applicable without anyone invoking its protections.⁵⁰ A probationer's sentence for committing the same or similar offense again should never merge and disappear into his first offense just because a trial court has heard the two proceedings together. But if that is the law, trial courts should know about it, so they have the opportunity to avoid such consequential scheduling decisions.⁵¹

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⁵⁰ *LaPorte*, 840 S.W.2d at 414 (State need not file notice of consolidation for it to be effective); *Ex parte Carter*, 521 S.W.3d at 347 (Section 3.03 confers a *Marin* waiver-only right that can be enforced for the first time on appeal).

⁵¹See Kuykendall v. State, 611 S.W.3d 625, 628 (Tex. Crim. App. 2020) (rejecting "the notion that the statute permits the 'allowable unit of prosecution' for failing to appear to turn on an administrative decision about whether to combine separate court proceedings into a single setting."). See also Beedy v. State, 250 S.W.3d 107, 113 (Tex. Crim. App. 2008) (unlawful cumulation order is remedied by deleting cumulation order not remanding for resentencing).

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant this petition, reverse the court of appeals in part, and affirm the trial court's cumulation order to the extent it requires the sentence in Cause 31227 to cease to operate before the sentences in Cause 34574 and 34752 can begin to be served.

Respectfully submitted,

STACEY M. SOULE State Prosecuting Attorney

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 3,554 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ Emily Johnson-Liw Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 26th day of January 2021, the State's

Petition for Discretionary Review was served electronically on the parties below.

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APPENDIX

Court of Appeals' Opinion

2020 WL 6929642 Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Do Not Publish

Court of Appeals of Texas, Beaumont.

Brian Ray MIDDLETON, Appellant

 \mathbf{v}

The STATE of Texas, Appellee

NO. 09-20-00014-CR, NO. 09-20-00015-CR, NO. 09-20-00016-CR, NO. 09-20-00017-CR, NO. 09-20-00018-CR

Submitted on August 11, 2020

Opinion Delivered November 25, 2020

On Appeal from the 253rd District Court, Liberty County, Texas, Trial Cause Nos. CR31225, CR31226, CR31227, CR34574, CR34752

Attorneys and Law Firms

Thomas Abbate Jr., for Appellant.

Stephen C. Taylor, Logan Pickett, for Appellee.

Before McKeithen, C.J., Kreger, and Johnson, JJ.

MEMORANDUM OPINION

CHARLES KREGER, Justice

*1 Pursuant to a plea bargain agreement, appellant Brian Ray Middleton entered pleas of guilty to theft of property greater than \$20,000 but less than \$100,000 in cause number CR31225, theft of property greater than \$1,500 but less than \$20,000 in cause number CR31226, and theft of property greater than \$1,500 but less than \$20,000 in cause number CR31227. See Tex. Penal Code Ann. § 31.03(e)(4)(A), (5). The trial court found the evidence sufficient to find Middleton guilty, but deferred further proceedings, and placed Middleton on community supervision for ten years in all three cases. Before the completion of the community supervision period, the State filed a motion to revoke in each of the three cause numbers. In its Motion to Revoke Unadjudicated Community Supervision, the State alleged among other violations, that Middleton committed two new criminal acts of theft while on community supervision. Middleton entered pleas of guilty to each of the new charges alleged by the State: (1) theft of property greater than \$2,500 but less than \$30,000 in cause number CR34752; and (2) theft of property greater than \$2,500 but less than \$30,000 in cause number CR34574.

In cause number CR31225, there was an agreement regarding restitution that lowered the offense charged to the lesser included offense alleged in the indictment. The parties agreed that this charge would be a state jail felony and not a third-degree felony.

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We cite to the current version of the Penal Code provisions, as the amendments made to the cited statutes do not affect this appeal.

As a result of his pleas, the trial court found Middleton violated the conditions of his community supervision in cause numbers CR31225, CR31226, and CR31227. The trial court also found Middleton guilty of theft of property greater than \$2,500 but less than \$30,000 in cause numbers CR 34752 and CR 34574. The trial court assessed punishment at two years in a state jail facility for each of the five cause numbers and ordered that Middleton's sentences were to run consecutively to each sentence in cause numbers CR31225, CR31226, CR31227, CR34574, and CR34752.

In his sole appellate issue, Middleton argues that the cumulation order in the judgments is prohibited and the judgments should be reformed because the cases arise from the same criminal episode. As such, the trial court was prohibited from ordering his sentences to run consecutively pursuant to Section 3.03 of the Texas Penal Code. See id. § 3.03. We affirm the trial court's judgment as modified.

Analysis

The record indicates that at the initial hearing on Middleton's three original theft charges, the trial court did not call the cause numbers separately when asking Middleton his plea to the three theft charges, and Middleton pled guilty to the offenses simultaneously. At the same hearing, the trial court accepted Middleton's plea agreement and sentenced Middleton for cause numbers CR31226 and CR31227, dealing with each cause before proceeding to the next cause number.³ At the revocation hearing, the trial judge sentenced Middleton without calling the five cause numbers separately and without adjudicating one cause before proceeding with the next. When sentencing Middleton, the trial judge purported to order as follows:

*2 THE COURT: All right. Mr. Middleton, stand at this time. I find that you did violate the terms and conditions of probation in 31225, 31226, 31227, and that you are guilty of the offenses as charged in 34574 and 34752. In each case, the Court is ordering that you spend two years in a state jail facility. The Court is further ordering that after you complete the sentence of two years in 31225, that you then serve the sentence of two years in 31226, and upon the completion of that sentence, that you serve the two years assessed in 31227, and then upon the completion of that sentence, that you complete the sentence in ... 34574, and then upon the completion of that sentence, then you complete the two years in 34752. So, in other words, these are consecutive sentences. I don't see that there's any impediment to it in 42.08. You need to stay in the pen as long as you can so you don't defraud other people. You just have no conscience at all, it appears. Good luck to you, Mr. Middleton. You are remanded to the sheriff for further imposition of sentence.

- At the original plea hearing, the trial court deferred finding guilt in cause number CR31225 until the amount of restitution was determined. The trial court later accepted the plea in cause number CR31225 and sentenced Middleton to deferred adjudication.
- Although Middleton did not object to the trial court's sentencing, he did not waive our review on appeal because "[section] 3.03 confers a *Marin* waiver-only right—a right that must be implemented unless affirmatively waived." *Ex parte Carter*, 521 S.W.3d 344, 347 (Tex. Crim. App. 2017) (citations omitted).

A trial court may order sentences to run consecutively or concurrently. *See* Tex. Code Crim. Proc. Ann. art. 42.08. However, the trial court's discretion is limited by section 3.03 of the Penal Code, which provides:

When the accused is found guilty of more than one offense *arising out of the same criminal episode* prosecuted in a single criminal action, a sentence for each offense for which he has been found guilty shall be pronounced. Except as provided by Subsection (b), the sentences shall run concurrently.

Tex. Penal Code Ann. § 3.03(a) (emphasis added).

A defendant is prosecuted in a single criminal action whenever the allegations and evidence of more than one offense arising out of the same criminal episode are presented in a single trial or plea proceeding, and the provisions of section 3.03 of the Penal Code apply. *LaPorte v. State*, 840 S.W.2d 412, 415 (Tex. Crim. App. 1992), *overruled on other grounds by Ex parte Carter*,

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521 S.W.3d 344, 347 (Tex. Crim. App. 2017); see also Tex. Penal Code Ann. § 3.01 (defining repeated commission of the same or similar offenses as a criminal episode). Because Middleton's cases involved repeated commission of the same offense, i.e., theft, his crimes are said to arise out of the same criminal episode as defined by section 3.01, regardless if they were committed against different victims at different times. See Cazarez v. State, 606 S.W.3d 549, 563 (Tex. App.—Houston [1st Dist.] 2020, no pet.) (quoting Tex. Penal Code Ann. § 3.01(2)) (rejecting the State's argument that the offenses are not the same criminal episode as defined under section 3.01 because although they involved different complainants and different time periods, "section 3.01 does not require identical offenses—they must merely be 'repeated commissions of the same or similar offenses' "); see also Miranda v. State, Nos. 03-13-00103-CR, 03-13-00182-CR, 03-13-00183-CR, 03-13-00184-CR, 03-13-00185-CR, 2014 WL 2957794, at *2 (Tex. App.—Austin June 24, 2014, no pet.) (mem. op., not designated for publication) (explaining that although the appellant's thefts happened at different times over the course of two years, "the thefts were still repeated commissions of the same or similar offenses[,]" and arose out of the same criminal episode).

Additionally, section 3.03(b) enumerates the offenses that may be ordered to run consecutively. See Tex. Penal Code Ann. § 3.03(b). Middleton's crimes of theft under section 31.03 of the Texas Penal Code are not expressly included in that list. See id. § 31.03(e)(4)(A); see also Parfait v. State, 120 S.W.3d 348, 350 (Tex. Crim. App. 2003) (noting that section 3.03(b) has the list of offenses for which sentences may run consecutively and if a crime is not on that enumerated list, "it is not for us to add or subtract to that which the Legislature has expressed"). Thus, the trial court's authority to cumulate sentences is expressly limited by the statute. See Mayo v. State, 321 S.W.3d 576, 583 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

*3 Finally, the trial court erred in cumulating Middleton's sentences because, although the plea hearing addressed each cause separately, the revocation hearing did not address each cause separately. *In Robbins v. State*, the Court of Criminal Appeals addressed this exact scenario and held the trial court erred by cumulating the appellant's sentences.

Although Appellant entered separate pleas of guilty to each indictment, the trial court held a consolidated punishment hearing. A plea proceeding is not complete until punishment has been assessed. Had the trial court accepted the plea and rendered sentence in one cause prior to hearing the plea and rendering sentence in the other, we would agree with the Court of Appeals that the trial court "fully completed one plea proceeding before starting the other." However, the consolidated punishment hearing defeated the State's and trial court's attempts to comply with the provisions of § 3.03, of the Penal Code.

914 S.W.2d 582, 583–84 (Tex. Crim. App. 1996) (citations omitted); *see also Cazarez*, 606 S.W.3d at 564 (explaining the trial court erred when it ordered the appellant's sentences to run consecutively because "the two theft offenses were prosecuted jointly").

Because we conclude that Middleton's offenses were part of the same criminal episode, not expressly listed in 3.03(b) allowing cumulative sentences, and because the charges were prosecuted jointly, we sustain Middleton's sole issue. *See Robbins*, 914 S.W.2d at 583–84.; *see also LaPorte*, 840 S.W.2d at 415. Accordingly, we modify the trial court's judgments in each of trial cause numbers CR31225, CR31226, CR31227, CR34574, and CR34752 by modifying the first page of each judgment to reflect that the sentences shall run concurrently and by deleting the cumulation order that appears on the third page of each judgment.

AFFIRMED AS MODIFIED.

All Citations

Not Reported in S.W. Rptr., 2020 WL 6929642

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